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In The

Supreme Court of the United States

October Term, 1940

No. 834

CITIES SERVICE OIL COMPANY,
Petitioner

vs.

B. P. DUNLAP, ET AL,
Respondents

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Supporting Brief

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In The

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*No.*_____

CITIES SERVICE OIL COMPANY,
Petitioner

vs.

B. P. DUNLAP, ET AL,
Respondents

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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To the Honorable the Supreme Court of the United States:

Cities Service Oil Company, a Delaware corporation, respectfully presents this its petition for writ of certiorari to the Honorable Circuit Court of Appeals of the United States for the Fifth Circuit, and to such end respectfuly shows:

Opinions of This Court and Court Below

A prior petition for writ of certiorari having been granted No. 847 (307 U. S. 617), the court in an opinion by Mr. Justice McReynolds, No. 28 (308 U. S. 208), reversed the decision of the Circuit Court

(100 Fed. (2d) 294, rehearing 101 Fed. (2d) 314), and on remand the Circuit Court (R. 330-334, rehearing R. 361-362; 115 Fed. (2d) 720) adherred to its former judgment affirming the decree of the trial court.

Preliminary Statement

Prior decisions of the Honorable Supreme Court and Circuit Court of Appeals contain a summary of the matter involved. They show that petitioner's predecessor in interest, the owner of a producing oil and gas lease on a tract of approximately 68 acres, brought this equitable action in the United States District Court for the Eastern District of Texas against respondents to quiet its title and remove cloud from title to a strip of land 66 feet wide along the West side of its 68 acre tract, alleging that the strip was a part of its 68 acre lease (R. 20-28). Jurisdiction was based on diversity of citizenship, situs of the property and requisite amount. Respondents claiming the strip, filed answers and cross-action to quiet their title (R. 28-43). Petitioner was substituted for plaintiff (R. 50-52) and judgment rendered for respondents (R. 52-53). The trial court filed findings of fact and conclusions of law (R. 58-72), to which petitioner excepted (R. 73-81) and filed a request for additional conclusions (R. 81-91) and appealed (R. 299-328) in the name of Cities Service Oil Company under an amendment of its charter changing its name (R. 93).

After the cause was remanded by this Honorable Court the decree of the trial court was again affirmed

on December 2, 1940 (R. 330-334), and petitioner's motion for rehearing (R. 336-355) was overruled in a written opinion on January 4, 1941 (R. 361-362). Leave to file a second motion for rehearing (R. 364-382) was denied on January 30, 1941 (R. 388).

Summary and Statement of the Matter Involved

In 1854 Texas patented the Thomason Survey of 640 acres in the form of a square under field notes describing controlling objects on the ground at the four corners and giving measured distances for the four sides of 1760 yards (1900.8 vrs.) (R. 60 ¶ 2; 96). However, as disclosed by a remeasurement in 1934 (R. 95), the actual distances between the four objects were greater than given in the patent to the extent that the North line was 126 feet longer and the other lines were correspondingly excessive (R. 60 ¶ 2).

By mesne conveyances the East half of the survey vested in Louisa Rogers in 1882 (R. 60 ¶ 3) under a chain of conveyances giving the same distances as contained in the patent (R. 98-104). Under applicable Texas decisions she acquired title to 63 feet of the excess East and West along the North line of the East half of the survey because the call for the East half controlled the distance of 880 yards (950 vrs.) given in the instruments *(Ford v. McRae (Tex. Com. App.), 96 S. W. (2d) 80)* and the trial court so found and concluded (R. 60 ¶ 3; 67 ¶ 14).

In 1899 her four sons, having inherited the East half of the survey (R. 61 ¶ 4-5), partitioned it through deeds duly executed and recorded, by allot-

ting W. H. Rogers a tract of 75-4/5 acres in the Northeast corner; J. F. Rogers a tract of 68-1/5 acres in the Northwest corner, and the other two brothers jointly a tract of 176 acres in the South half (R. 105-109 ¶ 6). The aggregate distances given in the partition deeds were the same as contained in the patent and other instruments in their chain of title, but the adjoinders called for in the partition deeds included the entire East half in the division.(1)

The 66 foot strip involved in this controversy lies along the West side of the 68-1/5 acre tract allotted to J. F. Rogers, and petitioner contends same is a part thereof. J. F. Rogers' partition deed calls for three adjoinders, of which two are with the tract allotted to his brother, W. H. Rogers, and one is with the Wiley Davis tract located West of and conterminous with the West line of the East half of the survey. The North line of his tract begins at the Northwest corner of the W. H. Rogers tract No. 1 and runs West

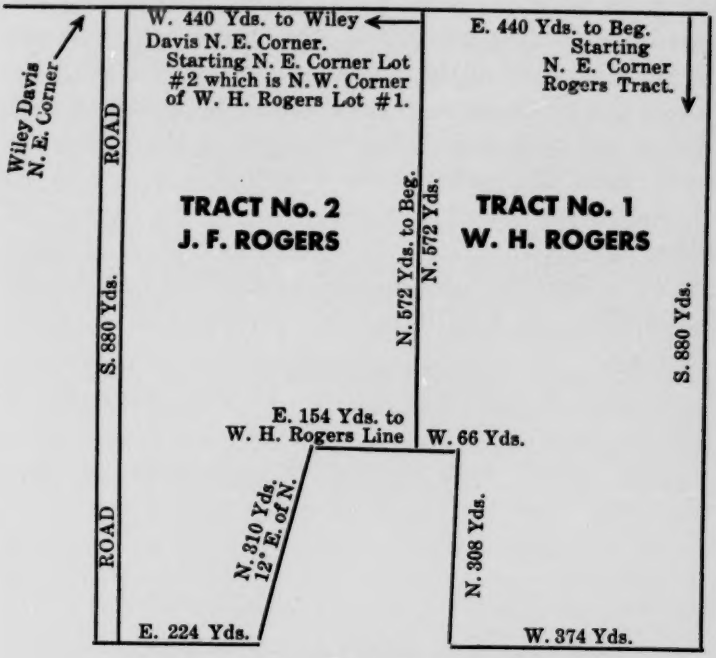
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(1) In *Livingston Oil & Gas Co. v. Shasta Oil Co. (Tex. Civ. App.), 114 S. W. (2d) 378 (writ dismissed)*, the court, in holding the strip was a part of the land covered by the prior lease, said:

"Generally, it will not be presumed that a party granting land intends to retain a long narrow strip next to one of his lines; but if the courses and distances approximate closely to a line or corner of the tract owned by the grantor—especially if the description in the deed corresponds, exactly or substantially, with the description in the title papers under which the land is held—it will be presumed that the lines mentioned are intended to reach the corners and run with the lines of the tract, though the trees marked and described have disappeared before the making of the deed. Western Min. & Mfg. Co. v. Peytonna Cannel Coal Co., 8 W. Va. 406; cited with apparent approval in Shell Petroleum Corporation v. Landers, Tex. Civ. App. 107 S. W. (2d) 509, at page 512."

440 yards to "Wiley Davis Northeast corner," a definite, locative and controlling call for adjoinder. However, as disclosed by a remeasurement in 1934, the distance between these two corners is actually 462 yards or 66 feet more than 440 yards or the excess in the East half of the Thomason Survey (R. 63 ¶ 7). From the Davis corner the boundary then turns South 880 yards with no call for an object at the terminus; then East 224 yards; then North 310 yards at 12 degrees East (no objects called for at the termini of these lines); then East 154 yards to "W. H. Rogers line," a definite, locative and controlling call for an adjoinder, and then North 572 yards to place of beginning.

The following is a plat of the two tracts partitioned to W. H. and J. F. Rogers, showing the location of the strip.



As pointed out by this Honorable Court in its previous opinion, a measured distance of 440 yards along the North line of the 68-1/5 acre tract ends 66 feet East of the Davis corner and the discrepancy occasioned the controversy over the 66 foot strip lying between a South line from the Davis corner and a parallel one 66 feet to the East.

In 1930, J. F. Rogers' heirs executed an oil and gas lease duly recorded and filed, on the 68-1/5 acre

tract, incorporating the same description as contained in the partition deed, with the additional clause "it being the intention to include all land owned or claimed by lessors in said surveys" (R. 138-143; 66 ¶12). By assignment and succession petitioner became the owner of this lease under conveyances duly recorded (R. 66 ¶ 12).

After petitioner's lease had been recorded for about four years, respondent Dunlap, in 1934, obtained from the three brothers of J. F. Rogers and his heirs an oil and gas lease on the 66 foot strip above described (R. 246-253).

Claiming that the land described in the Dunlap lease of 1934 was within the boundaries of the earlier one of 1930, petitioner instituted this action to remove cloud. Dunlap and the Rogers, under a cross-bill, alleged that the call in the 1899 deed to J. F. Rogers "*for the Wiley Davis Northeast corner*" was inserted through inadvertence and mistake (R. 31 ¶ IV); that the corner was not fixed or located or susceptible of definite ascertainment in 1899; that the distance call of 440 yards controlled (R. 34 ¶ IX); **that the purpose of the parties was to establish the Western terminus of the North line 66 feet East of the Davis corner and leave a strip on the West in common ownership for use as a road** (R. 34-35 ¶ 10-11).

Respondents failed to prove that the Davis corner was not fixed on the ground or susceptible of ascertainment (R. 225-227) so the trial court found that the corner was 66 feet West of a measured distance of 440 yards (R. 63 ¶ VI; 67 ¶ 14; 58 ¶ 15; 66 ¶ 12).

In its first opinion the Circuit Court of Appeals in reforming the deed held that the scope of admissible evidence was enlarged by the pleaded issue that the call for the Wiley Davis corner got into the deed by mistake, and that parol and other extrinsic evidence of what was done and said was admissible and showed that the Northwest corner of the J. F. Rogers tract was purposely put about 66 feet East of the Davis corner so as to leave a strip undivided and under the control of the four Rogers heirs for the purpose of a road. It further held that parol evidence was admissible to prove that in 1899 a stake was driven in the ground by the surveyor 66 feet East of the Davis corner, although it was not mentioned in any deed in petitioner's chain of title; that equity would correct the mistake in calling for the Davis corner and in failing to call for the stake although petitioner claimed it was a bona fide purchaser for value without notice because there was no proof showing it was such a purchaser. On rehearing it held that while in Texas courts the rule is established that on an issue of bona fide purchaser for value without notice, the burden of proof is on the person attacking the legal title and asserting the equitable to prove notice, nevertheless the Texas rule being contrary to the Federal rule, would not be followed because the burden of proof is a matter of practice or procedure and not of substantive law.

This Honorable Court, in reversing and remanding the case, held that petitioner was entitled to the protection afforded a bona fide purchaser by the local Texas rule and in the absence of evidence showing it

was not a bona fide purchaser, its position was superior to a claimant asserting an equitable title.

Petitioner was not seeking to drill wells on the 66 foot strip which respondents pleaded was being used for a road nor was it in any manner disturbing the public in the use of the road. Respondents by having executed the oil and gas lease were attempting to use the strip for the purpose of drilling wells for oil.

On remand the Circuit Court held that the partition deed to J. F. Rogers was not ambiguous on its face, nor was it latently ambiguous although the given distance of 440 yards would not reach the Davis corner, because the rule was well established in Texas that a distance is generally overruled by a call for a fixed object, the law esteeming that a mistake in the measurement, or in recording it, is more likely than one about the fixed object. It held, however, that even though the deed could not be reformed against petitioner, a bona fide purchaser, nevertheless parol extrinsic evidence was admissible to prove the surveyor in 1899 set objects not called for in any deed in the chain of title at places not coincident with the called adjoinder (Davis corner), in establishing the allegations of respondents that the adjoinder call was mistakenly included in the partition deed. The court based its holding on the theory that by extending the North line of the 68-1/5 acre tract to the Davis corner the survey would not close because the distance of the South line would be short by 66 feet, thus creating a latent ambiguity. On rehearing its attention was directed to the fact that the survey would close by continuing the South line to the W. H. Rogers line,

an adjoinder called for in the partition deed to J. F. Rogers, but the court adherred to its previous opinion, holding on rehearing that the W. H. Rogers line was not a controlling adjoinder or monument because it was created in the partition and did not exist before. No authority was cited to support this holding and it is contrary to the rule of property announced by Texas courts.

Although the Honorable Circuit Court held that in light of the decision of this court the deeds could not be reformed, as it had first done, the very effect of its decision is a reformation in 1934 of the partition deed of 1899, after the rights of petitioner, a bona fide purchaser, had intervened, by rejecting and excluding the two controlling adjoinder calls, viz, the Wiley Davis Northeast corner and the W. H. Rogers line. The Circuit Court in its last two opinions, adherring to its prior affirmance of the decree of the trial court, has, in effect, failed to follow the opinion of this Honorable Court in the case at bar and the substantive law of Texas, as will be more fully shown hereinafter under "*Reasons Relied on for the Allowance of the Writ.*"

Statement of Grounds on Which Jurisdiction of the Supreme Court Is Invoked

The jurisdiction of this court is based upon *Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, 43 Stats. 938; (U. S. C. A. Title 28, Sec. 347), and Rule 38 ¶ 5), Subd. (b)* of this Honorable Court, in that the Honorable Circuit Court of Appeals in construing the partition deed to J. F. Rogers, and in holding admissible parol extrinsic evidence to vary its terms, failed to follow the decisions of the Supreme Court of Texas, on matters of local substantive law, thereby rendering its opinion conflicting with and contrary to the applicable decisions of this court in the case at bar and in *Erie RR. Co. v. Tompkins, 304 U. S. 64; Ruhlin v. New York Life Ins. Co., 304 U. S. 202; Olcott v. Bynum, 17 Wall. 44; Massachusetts v. New York, 271 U. S. 65*, and *Hardin v. Jordan, 140 U. S. 371*, holding that the construction of deeds and presumption attended with their delivery are matters of local substantive law to be followed by United States Courts.

The Honorable Circuit Court failed to follow the local substantive law of Texas in the following particulars:

(a) In holding that even after the rights of petitioner, a bona fide purchaser, had intervened, the partition deed, although not patently ambiguous, would be construed so as to exclude the call for the Davis corner because of respondents' mistake in 1899, the Court failed to follow the applicable Texas cases of *Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69; Miller v.*

Southland Insurance Company (Tex. Civ. App.), 68 S. W. (2d) 558, and *Swann v. Mills (Tex. Civ. App.), 215 S. W. 850*, and other cases which hold that a bona fide purchaser acquires title to all land included between the adjoinders called for in his deed if there is nothing on the face of the conveyance to put him upon inquiry as to the claims of his predecessors in title arising out of their alleged mistake in calling for such adjoinders when they intended to stop at the distances given.

(b) In holding that, even though the partition deed was not ambiguous on its face, petitioner, a bona fide purchaser, did not acquire title to all the land between the adjoinders called for, the Court wholly disregarded the applicable Texas case of *Gulf Production Company, et al v. Baton (Tex. Civ. App.), 108 S. W. (2d) 960*, and other similar cases which hold that where a tract of land is partitioned among the joint owners, the presumption obtains in Texas that the whole of the land is partitioned unless some portion thereof is expressly excepted and such presumption becomes conclusive when the right of innocent purchasers have intervened. This presumption, if followed, would have precluded respondents from attacking petitioner's title because the adjoinder calls included the strip and nowhere was it expressly excepted from the partition deed.

(c) In holding that by extending the North line of the 68-1/5 acre tract to the Davis corner the survey would not close by 66 feet since the South line could not be continued to the W. H. Rogers line, an adjoinder called for, because such line had not existed

before, but originated in the partition and could not be considered a controlling monument, and in concluding that the call for the Davis corner was incorrect, the Court wholly disregarded the applicable Texas cases of *Brooks v. Slaughter (Tex. Civ. App.), 218 S. W. 632; Longoria v. Shaffer, 77 Tex. 547, 14 S. W. 160; Booker v. Hart, 77 Tex. 146, 12 S. W. 16; Bell v. Preston (Tex. Civ. App.), 47 S. W. 375,* and many other authorities cited in *7 Tex. Jur., Sec. 28, page 152, et seq.*, which hold that Texas follows the Pennsylvania rule that each and every corner created by and called for in partition deeds and each and every corner existing at the time of the partition and called for in the deeds, constitute one block or system of surveys and all tracts are to be located together as one block or one large tract in so far as they call for each other.

(d) In holding that a latent ambiguity existed, justifying a resort to parol extrinsic evidence to prove that the call for the Davis corner was mistakenly included in the partition, even as against a bona fide purchaser, the Court failed to follow the applicable Texas cases of *Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69; Miller v. Southland Insurance Company (Tex. Civ. App.), 68 S. W. (2d) 558,* and *Swann v. Mills (Tex. Civ. App.), 219 S. W. 850,* which hold that after the rights of a bona fide purchaser have intervened, parol evidence is not admissible to prove that an adjoinder was mistakenly called for and the predecessors in title intended for the distances and not the adjoinders to control the location of the boundaries.

(e) In holding that in locating boundaries, parol

evidence is admissible to show the locations of objects set by a surveyor although not called for in any instrument in the chain of title, and not coincident with the adjoinders called for, the Court wholly disregarded the applicable Texas cases of *Reast v. Donald, 84 Tex. 648, 19 S. W. 795*, and *Hays v. Clawson (Tex. Civ. App.), 286 S. W. 857 (writ dismissed)*, which hold that the locations of objects found on the ground but not called for in the field notes are inadmissible in fixing boundaries of a tract of land, particularly when such objects conflict with the field notes.

(f) In holding that there was a latent ambiguity in the partition deed because the distances given do not reach the adjoinders called for, the court failed to follow the applicable Texas case of *Swann v. Mills, 219 S. W. 850*, which holds that a deed is neither patently nor latently ambiguous because the distances given do not reach the adjoinders called for.

(g) In holding that the partition deed did not cover the 66 foot strip which respondents pleaded they were using for a road at the time of the partition, because it did not mention the road, and the wagon trail was only partly on the strip, but did not touch the land conveyed, the Court failed to follow the applicable Texas cases of *Mitchell v. Bass, 26 Tex. 372; Cantley v. Gulf Production Company, — Tex. —, 143 S. W. (2d) 912; Cox v. Campbell, — Tex. —, 143 S. W. (2d) 361; Texas Bitulithic Company v. Warwick (Tex. Com. App.), 293 S. W. 160; Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080; Amerman v. M. K. & T. Ry. Co., 182 S. W. 54*, and other cases which hold that where there is a convey-

ance of land adjacent to or adjoining a roadway, public or private, opened or closed, title to the road passes to the grantee by virtue of such conveyance unless there is in the conveyance language expressly rebutting such construction or specifically indicating a contrary intent, it being immaterial that the road was never opened, or was only used in part, or that it was abandoned.

Questions Presented

The questions presented in this petition for writ of certiorari were duly raised in the trial court by exception to the court's findings of fact, request for additional findings and in the briefs and motions for rehearing in the Circuit Court of Appeals.

The "*Statement of Grounds on Which Jurisdiction of the Supreme Court Is Invoked*" (ante-pp. 11-15) contains all the questions presented in this petition and to save prolixity reference thereto is here made.

Reasons Relied on for the Allowance of the Writ

Surveying is not an exact science but is dependent on the accuracy of man and delicate scientific instruments. It is a matter of common knowledge that in the early settlement of Texas the cost of surveying exceeded in many instances the value of the land. Experience taught the pioneers that it was less difficult and more economical to mark objects on the ground than to measure distances. As the State developed the inaccuracies of early surveys became apparent and with the discovery of oil in Texas land

that was worth scarcely a hundred dollars as early as 1900 became worth millions of dollars.

Texas courts were therefore confronted with much burdensome litigation involving the location of small strips and gores arising out of the fact that distances were not always accurate. Its courts announced the salutary rule that it would be presumed that a party granting land did not intend to retain long narrow strips next to his lines but that if the locations and distances approximated closely to a line or corner of the tract owned by the grantor,—especially if the description in the deed corresponded exactly or substantially with the title papers under which the land was held—it would be presumed that the lines mentioned were intended to reach the corners and run with the lines of the tract. *Livingston Oil and Gas Co. v. Shasta Oil Company (Tex. Civ. App.), 114 S. W. (2d) 378, writ dismissed,* correctly states the Texas rule.

It is therefore of great importance to the welfare and tranquility of the State that calls for adjoinders in many thousands of patents and deeds to land in Texas control courses and distances when the rights of bona fide purchasers have intervened and money has been expended on the reliance that the boundaries will be located according to the called adjoinders.

There should not be two rules of construction, one the Federal rule as announced by the Circuit Court that distances will control objects, even after the rights of bona fide purchasers have intervened, and the State rule that its citizens may buy, sell and lease real estate upon the assurances that calls for adjoinder will control the given distances.

In its first opinion the Circuit Court refused to follow the Texas rule on the presumption of innocence attended with the purchase of the legal title to land under deeds calling for adjoinders, but this Honorable Court, in reversing the case, held that the Texas rule was a valuable assurance in favor of the purchaser's title; so that thereafter the Circuit Court could not reform the partition deed of 1899, as it had done in the first instance by holding that parol evidence was admissible to show the call for the Davis corner was inserted in the deed through mistake, but in adherring to its affirmance of the decree, it held that, although there was neither indefiniteness nor contradiction on the face of the deed and no patent ambiguity, nevertheless there was a latent ambiguity because the distances would not reach the adjoinders. In determining what constituted controlling adjoinders it held without citing a single Texas case, that an adjoinder or line originating in a partition could not be considered a controlling monument since it had not existed before.

We therefore respectfully submit that the writ should be granted to correct the following errors of the Honorable Circuit Court:

(a) The Circuit Court failed to follow the decision of this Honorable Court in the case at bar in that it held that as against petitioner, a bona fide purchaser, the call for the Davis corner should be disregarded in favor of the distance of 440 yards. The result was a reformation of the instrument by striking the adjoinder call.

(b) It failed to follow the local law of Texas in construing

the deed and oil and gas lease, thereby rendering an opinion contrary to the decisions of this court holding that Federal Courts follow State Courts rules of evidence and construction of deeds in the trial of cases involving title to lands. Olcott v. Bynum, 17 Wall (84 U. S.) 44.

(c) The rule in Texas is that a bona fide purchaser acquires the legal title to all land included between adjoinders called for in his deed if there is nothing on the face of the conveyances to put him upon inquiry as to the claims of his predecessors in title arising out of their alleged mistake in calling for such adjoinders when they intended to stop at the distances given, and the Circuit Court of Appeals failed to follow such Texas rule by rejecting and disregarding the call for the Davis corner. Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69; Miller v. Southland Insurance Company (Tex. Civ. App.), 68 S. W. (2d) 558, and Swann v. Mills (Tex. Civ. App.), 219 S. W. 850.

(d) Texas courts follow the Pennsylvania rule that each and every corner created by and called for in partition deeds and each and every corner existing at the time of the partition and called for in the deeds, constitute one block or system of surveys and all tracts are to be located together as one block or one large tract in so far as they call for each other. Brooks v. Slaughter (Tex. Civ. App.), 218 S. W. 632; Longoria v. Shaffer, 77 Tex. 547, 14 S. W. 160; Booker v. Hart, 77 Tex. 146, 12 S. W. 16; Bell v. Preston (Tex. Civ. App.), 47 S. W. 375. The Circuit Court held that the call for the W. H. Rogers line could not be considered a controlling monument because it originated in the partition and did not exist before.

(e) Texas courts hold that where a tract of land is partitioned among the joint owners the presumption obtains that the whole of the land is partitioned unless some portion thereof is expressly excepted and the presumption becomes conclusive

when the rights of innocent purchasers are involved. Gulf Production Co. v. Baton, 108 S. W. (2d) 960. The 66 foot strip was not expressly excepted but was included by the call for the Davis corner. The Circuit Court of Appeals failed to follow the Texas rule of conclusive presumption attended with partitioning land after the rights of an innocent purchaser had arisen, by holding that the 66 foot strip was not included in the deed to J. F. Rogers in 1899.

(f) Texas courts do not admit the introduction of parol evidence to vary the terms of a deed to prove an adjoinder was called for through mistake after the rights of a bona fide purchaser have intervened. Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69; Miller v. Southland Insurance Company (Tex. Civ. App.), 68 S. W. (2d) 558, and Swann v. Mills (Tex. Civ. App.), 219 S. W. 850. The Circuit Court failed to follow the Texas rule but held that parol evidence was admissible to show the surveyor set objects not called for in the deed at places not coincident with the adjoinders, and to show that the parties intended to leave unpartitioned the 66 foot strip.

(g) Texas courts do not admit the introduction of parol evidence to show the location of objects not called for in a deed where such objects are at places different from the adjoinders called for. Reast v. Donald, 84 Tex. 648; 19 S. W. 795; and Hays v. Clawson (Tex. Civ. App.), 286 S. W. 857, writ dismissed. The Circuit Court of Appeals failed to follow the Texas rule by holding that parol evidence was admissible to show the surveyor in 1899 set stakes not called for in any deed in petitioner's chain of title at pl[illegible] not coincident with the adjoinders.

(h) Texas courts hold that a deed is not patently or latently ambiguous because the distances are insufficient to reach the adjoinders. Swann v. Mills, 219 S. W. 850. The Circuit Court of Appeals failed to follow the Texas rule in holding that the partition deed contained a latent ambiguity because the distances were insufficient to reach the adjoinders.

(i) Texas courts hold that where there is a conveyance of land adjacent to or adjoining a roadway, public or private, opened or closed, title to the road passes to the grantee, by virtue of such conveyance subject to the easement, unless there is in the conveyance language expressly rebutting such construction or specifically indicating a contrary intent. Mitchell v. Bass, 26 Tex. 372; Cantley v. Gulf Production Company, — Tex. —, 143 S. W. (2d) 912; Cox v. Campbell, — Tex. —, 143 S. W. (2d) 361; Texas Bitulithic Company v. Warwick (Tex. Com. App.), 293 S. W. 160; Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080; Amerman v. M. K. & T. Ry. Co., 182 S. W. 54. The Circuit Court of Appeals failed to follow the Texas rule by holding that title did not pass although respondents had pleaded they intended to use the strip for a road, since the deed did not mention the road and the travel was only on a part of the 66 foot strip and did not touch the land conveyed.

Conclusion

Counsel for respondents, except J. B. Parker and Curtis M. Willock, is Hon. Angus G. Wynne, who resides in Longview, Texas, and counsel for respondents, J. B. Parker and Curtis M. Willock, is Hon. Cecil N. Cook, who resides in Houston, Texas, all of whom have been duly served with copies of this petition and the record therein, as evidenced by their receipt and waiver of notice attached hereto.

WHEREFORE, for the reasons set forth herein, as well as in the supporting brief, hereto annexed, petitioner respectfully prays this Honorable Court to issue its writ of certiorari to the Honorable Circuit Court of Appeals for the Fifth Circuit, commanding

such Honorable Court to forthwith send up a full and complete transcript of the record; that all proceedings be certified to this Court, and that this cause be reviewed and the manifest errors of the Honorable Circuit Court of Appeals be revised and corrected, as provided by law; that upon hearing by this Honorable Court the judgment below be reversed, and petitioner's title to the land in controversy be quieted, the clouds cast upon its title by the claims of the respondents be removed, and that such further proceedings be held herein as may be provided by law and equity.

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THE STATE OF TEXAS, }
COUNTY OF TARRANT. }

CLAYTON L. ORN, being duly sworn, says that he is of counsel for Cities Service Oil Company, a corporation, petitioner in the foregoing petition for certiorari; that he prepared the foregoing petition for writ of certiorari and that the allegations therein are true and that there is just cause for same as he verily believes.

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CLAYTON L. ORN

SUBSCRIBED AND SWORN TO before me this the 3rd day of March, A. D., 1941.

Ruby Hawkins,
Notary Public in and for
Tarrant County, Texas.

SEAL.